FILE COPY

No. 197

IN THE

Supreme Court of the United States

October Term, 1935

UNITED STATES OF AMERICA

Petitioner

v.

LOUIS H. PINK

Respondent

MEMORANDUM FOR RESPONDENT IN ANSWER TO "SUPPLEMENT" TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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On October 7, 1935, simultaneously with the opening of the present session of the Court, petitioner served a "Supplement" to its petition filed on July 8, 1935, which we answered on July 30, 1935. Although counsel for respondent are not aware of any rule or precedent in practice to thus reopen the argument of this application, it is respectfully requested that if that "Supplement" is to be received and considered, the Court accept and consider this memorandum in reply.

We concur and agree with the answering memorandum for the respondent, Bank of New York and Trust Company, and its answer to the "Supplement" to petition for writ of certiorari, and respectfully refer this Court to said memorandum for a complete answer to said "Supplement." We wish, however, to point out briefly to the Court some outstanding errors and omissions in petitioner's "Supplement."

I

The Effect of the Soviet Decrees

Petitioner's "Supplement" states (pp. 3-4) that after the policyholders and domestic creditors had been paid it was the duty of the Superintendent of Insurance, as liquidator, to transmit the surplus funds to the domiciliary liquidator. Not only was there no domiciliary liquidator of the First Russian Insurance Company, but the Court of Appeals, in its decision in 255 N. Y. 415, stated specifically the duties of the Superintendent of Insurance, as liquidator. The Court said (p. 422):

> "In the silence of the statute, a decree instructing the liquidator as to the *administration of the surplus must conform to the exactions of equity and justice.*
>
> "*Holding as we do that the surplus must be made available for the payment of creditors and policyholders with claims founded upon foreign business,* there remains the question of the remedy." (Italics ours throughout.)

The Superintendent of Insurance, as liquidator of the First Russian Insurance Company, has been and still is

carrying out the directions of the Court of Appeals pursuant to said decision. (See also pp. 6, 14-15 of our main brief.)

The Court further said (p. 424):

> "*There is no receiver at the domicile,* and the corporations are still solvent, willing, as well as able, to pay their creditors in full."

The contentions raised by the petitioner (p. 5 of "Supplement") on the question as to whether a nation can be sued without its consent are absolutely not in point and are not involved herein.

We must point out a grave error by petitioner (p. 6 of "Supplement") in asserting that it affirmatively appears in the liquidation proceeding in the State Court that the Soviet Government was a claimant by virtue of its own decrees. The statement is without foundation. The decision of the Court of Appeals (255 N. Y. 415), the opinion of which was written by CARDOZO, *J.*, fails to mention, even by inference, any possible claim of the Soviet Government. The only question involved was the payment of foreign creditors, and the Court held that in this particular instance they should be paid by the New York liquidator.

It is highly significant that petitioners in their supplemental brief, wherein for the first time they argue on the merits the question of the effect of Soviet decrees, have

failed to cite as authority even one case in support of their untenable theories. Our main brief is replete with authority for our views, and petitioner has palpably failed to answer or distinguish any of them.

II

The Scope of the Assignment

In its brief the petitioner has skirted around the main issue concerning the scope of the assignment. The only argument of petitioner is that the assignment should be given a broad interpretation.

But, as broad an interpretation as can be given to any instrument cannot change the simple fact that there were assigned to the United States only amounts due to the Soviet Government as successor of prior Governments of Russia from *American Nationals*. The Soviet Government never has made claim to these funds admittedly not due from or owing by American Nationals, but belonging to the former Russian Insurance Corporations, and such funds could not be and never were assigned. This point is more fully covered in our main brief at pages 10-12.

III

Jurisdiction

Petitioner refers to the case of *Brown* v. *Duffin*, 13 F. (2d) 708, as authority for the proposition that the State Court proceeding is not a bar to the instant suit. That case is absolutely not in point, because its holding

is based on the fact that the first action was *in personam* and, therefore, was no bar to a second action in the Federal Courts. But the Court also held in that case that if the first action in the State Court had been *in rem*, then the State Court would have had exclusive jurisdiction. Here, the first action (the present liquidation proceeding of the First Russian Insurance Company) is unquestionably *in rem* (Record, *United States* v. *George S. Van Schaick*, fols. 208-239) and even under the ruling in *Brown* v. *Duffin* the State Court has exclusive jurisdiction.

Though this point has been fully covered in respondent Bank of New York & Trust Company's answering brief (pp. 3-4) and to which we respectfully refer this Court, we desire to particularly emphasize that the liquidation proceeding of the First Russian Insurance Company is still in progress, and that said proceeding is strictly one *in rem*.

There is no conflict between the decision below and the case of *Brown* v. *Duffin, supra*.

The petition should be denied.

Respectfully submitted,

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October 11, 1935.